Filed 9/22/06 Jenness v. Safeco Ins. Co. of America CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GARRY JENNESS,

Plaintiff and Appellant,

v.

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant and Respondent.

F048034

(Super. Ct. No. 307143)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Roger M. Beauchesne, Judge.

Jerry N. Budin for Plaintiff and Appellant.

Lombardi, Loper & Conant, Ralph A. Lombardi and Lori A. Sebransky for Defendant and Respondent.

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Garry Jenness filed this action against Safeco Insurance Company of America (Safeco) to enforce a stipulated judgment entered in his favor after he settled a personal injury claim he asserted in the underlying action against William Kidd (Kidd), Allan Dix (Dix), General Motors Acceptance Corporation (GMAC) and Western Auto Pool and WAP Recovery (collectively WAP). The settlement included a covenant not to execute

on the judgment against Kidd and an assignment of any rights Kidd might have had against Safeco. Following a bench trial, the trial court found the stipulated judgment could not be enforced against Safeco because Safeco did not participate in the settlement discussions that led to the stipulated judgment, or agree to the stipulated judgment, and did not abandon its obligation to defend Kidd. The trial court entered judgment in Safeco's favor. On appeal, Jenness contends the trial court erred when it found that Safeco did not deny a defense to, or abandon the defense of, Kidd in the underlying action. As we shall explain, we reject Jenness's contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Safeco Policy

Safeco issued a policy of business automobile liability insurance to WAP, which covered the period September 15, 1998 to April 1, 1999. The policy contains a combined single limit of liability for both property damage and bodily injury in the amount of one million dollars. The policy insures "… all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies.…" The policy confers on Safeco the "right and duty" to defend any insured against a suit asking for such damages, and to "investigate and settle any claim or 'suit' as we [Safeco] consider appropriate."

The policy expressly prohibits the insured from assuming any obligation or expense without Safeco's consent: "2. DUTIES IN THE EVENT OF ACCIDENT CLAIM, SUIT OR LOSS [¶] We have no duty to provide coverage under this policy unless there has been full compliance with the following duties: [¶] … b. Additionally, you and any other involved 'insured' must: [¶] (1) Assume no obligation, make no payment or incur no expense without our consent, except at the 'insured's' own cost.… [¶] 3. LEGAL ACTION AGAINST US [¶] No one may bring a legal action against us under this Coverage Form until: [¶] … (b) Under Liability Coverage, we agree in

writing that the 'insured' has an obligation to pay or until the amount of that obligation has finally been determined by judgment after trial.…"

The policy's "Other Insurance" provision makes the Safeco policy excess when the claim involves an auto the insured (WAP) does not own: "6. OTHER INSURANCE [¶] a. For any covered "auto" you [WAP] own, this Coverage Form provides primary insurance. For any covered 'auto' you don't own, the insurance provided in this Coverage Form is excess over any other collectible insurance.…"

The Underlying Accident and Lawsuit

The underlying personal injury litigation arose out of an altercation that occurred in Escalon on November 11, 1998. GMAC had contracted with WAP to repossess a vehicle it financed for Jenness. That evening, William Kidd repossessed Jenness's vehicle in the company of passenger Allan Dix, who owned the tow truck used in the repossession. Jenness believed the vehicle was being stolen and as the tow truck was towing the vehicle away, he (along with his wife and his son's girlfriend) chased the tow truck in a car Mrs. Jenness was driving. The car caught up with the tow truck and pulled in front of it, blocking its path and causing it to stop. Jenness was angry and yelled at Kidd, who was driving, demanding his car be returned. When Kidd did not comply, Jenness took a golf club and hit the back of the truck, striking the rear of the cab. Jenness then moved to the front of the truck and took another swing with the golf club, hitting the hood. While Jenness was in front of the tow truck, the truck rolled forward into him, causing severe injuries.

In November 1999, Jenness filed a personal injury suit against Kidd, WAP, GMAC and Dix in Stanislaus Superior Court (the Jenness action). In addition to a negligence claim, the complaint stated a cause of action against Kidd and Dix for "intentional tort." This claim alleged: "During an attempt to repossess a vehicle in the legal possession of [Jenness], [Kidd and Dix] did intentionally and maliciously cause the vehicle they were occupying to strike the plaintiff." Jenness sought punitive damages

from Kidd. That same month, Kidd and Dix filed a personal injury action against Jenness in San Joaquin Superior Court, for injuries they allegedly sustained in the altercation. This action ultimately was consolidated with the Jenness action for all purposes.

Liability in the Jenness action was disputed. Jenness claimed that while he was in front of the tow truck, Kidd was fully conscious and purposefully drove the tow truck into him. Kidd, on the other hand, alleged Jenness swung the golf club into the rear window of the tow truck's cab, hitting Kidd in the head and knocking him out, and while he was slumped unconscious in the tow truck, his foot unintentionally slipped off the brake and the tow truck rolled forward, hitting Jenness. Jenness denied hitting Kidd with the golf club.

Jenness was charged with felony assault with a deadly weapon (Penal Code section 245, subdivision (a)(1)), with a battery enhancement for causing bodily injury to Kidd. Jenness pled not guilty to all charges. Ultimately he accepted a plea bargain and pled no contest to the felony assault charge without the battery enhancement.

The Insured's Defense in the Jenness Action

On January 20, 2000, the Jenness action was tendered to Safeco, which acknowledged coverage and agreed to defend WAP, Kidd and GMAC without a reservation of rights. Safeco appointed attorney Larry Bragg of the Law Offices of Carol Ventura to defend Kidd, as well as Safeco's other insureds, WAP and GMAC. Dix was insured by State Farm Mutual Automobile Insurance Company (State Farm), which defended him under a $300,000 liability policy State Farm issued to him.

Because Dix owned the tow truck used in the repossession, Safeco determined its coverage for Kidd would be excess to the coverage State Farm provided to Dix. Safeco based its conclusion on its understanding that coverage ordinarily follows the vehicle and the language in its policy that "[f]or any covered 'auto' you don't own, this Coverage Form is excess over any other collectible insurance.…" Based on this understanding, Safeco formally tendered the defense of Kidd, WAP and GMAC to State Farm in January

2000. When tendering defense, Safeco specifically asked State Farm to keep it advised of the status of the claim at all times.

Safeco continued to defend Kidd, WAP and GMAC for ten months, without contribution or participation from State Farm, while State Farm considered the tender. Anticipating State Farm's assumption of the defense, on August 18, 2000, Bragg prepared an association of attorney form, which he sent to a State Farm attorney so that attorney could appear as Kidd's counsel of record. State Farm, however, responded on August 28, 2000, that it was not authorizing its attorney to sign the form and was not assuming the defense of all named defendants.

On September 1, 2000, State Farm agreed to defend Kidd under a reservation of rights, while it denied the defense of Safeco's other insureds, WAP and GMAC, who Safeco continued to defend through Bragg. In accepting Kidd's defense, State Farm's claim specialist advised Safeco: "Our policy reads that we would be excess for Mr. Kidd. It is my understanding that your policy also reads that you are excess for Mr. Kidd. As both policies are for excess coverage, it is my understanding that we would therefore then co-insure. I have requested that we share defense costs for Mr. Kidd; however, you have informed me that you do not wish to split these costs. I have contacted a local attorney and have requested that he substitute in as counsel for Mr. Kidd and handle this matter. We will then handle the cost of Mr. Kidd's defense at a later time through special arbitration." On October 17, 2000, State Farm substituted the law offices of Curtis & Arata as Kidd's defense counsel in place of Bragg, and George Arata from that office assumed Kidd's defense. Bragg discussed the substitution of attorneys with Kidd. Bragg explained that Safeco was not abandoning him, and State Farm's participation meant that now Kidd had $300,000 of coverage under the State Farm policy in addition to the one

million dollar limit of the Safeco policy. Bragg told Kidd to call him if there were any problems. Kidd never called Bragg.[1]

After undertaking Kidd's defense, Arata asked Bragg and the attorney representing Dix to share expert expenses, including the cost of medical exams and rehabilitation reports. Bragg declined the request, stating that his clients did not agree to share expert expenses at that time. In asking Bragg to share expert witness costs, Arata was not discussing sharing the costs of Kidd's defense.

Had State Farm not agreed to assume Kidd's defense or withdrawn from defending Kidd, Safeco would have continued to defend Kidd through Bragg's office. State Farm, however, never denied coverage or withdrew from Kidd's defense. State Farm's defense of Kidd was not affected in any way by State Farm's reservation of rights. Arata defended Kidd totally and to the best of his ability.

The Safeco Declaratory Relief Action

Safeco and State Farm disagreed about how their policies applied, in particular whether Safeco's policy would be excess to State Farm's or whether both policies would act as primary co-insurance. According to Bragg, the dispute arose before his

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[1] At trial, Jenness objected to the admission of Bragg's testimony regarding his conversation with Kidd on hearsay grounds. Safeco's counsel responded the evidence was being offered to address the abandonment theory and what Bragg told Kidd was relevant to Bragg's state of mind. On that basis, the trial court allowed in the testimony. On appeal, Jenness contends the court erred in doing so because Bragg's state of mind is irrelevant. Even if this were true, however, the evidence is admissible for another nonhearsay purpose, namely that Kidd had notice of Safeco's positions regarding coverage and defense of the Jenness action. (See, e.g., *Caro v. Smith* (1997) 59 Cal.App.4th 725, 733 ["An out-of-court statement is properly admitted for a relevant nonhearsay purpose, such as to show a warning, admonition, or notice"]; *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 ["[E]vidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer … is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement"].) Therefore, the court did not err in admitting the evidence.

involvement in the case, when someone at State Farm initially agreed to defend Bragg's clients, but State Farm later changed its position.

In October 2000, Safeco, through Bragg, filed a declaratory relief action in Stanislaus Superior Court, seeking a judicial determination that State Farm had a primary obligation under its policy to defend and indemnify WAP, GMAC and Kidd, and Safeco's defense and indemnity obligation was "secondary" (or excess) to that of State Farm. Safeco alleged in the complaint that Kidd was operating the tow truck, which is an insured vehicle under State Farm's policy, with Dix's express permission, and since State Farm's policy defines an "insured" as both persons using a covered vehicle with the named insured's consent and any other person or organization liable for the use of a covered vehicle by another insured, Kidd, WAP and GMAC qualified as insureds under the policy. Safeco further alleged that pursuant to Insurance Code section 11580.9, subdivision (d), State Farm's policy provides primary insurance coverage since State Farm's policy specifically describes the vehicle Kidd operated at the time of the incident, while Safeco's policy does not.

In its answer to the complaint[2], State Farm admitted its policy described the tow truck involved in the incident and Kidd was operating the tow truck with Dix's express permission. State Farm alleged that its policy "specifically provides that there is no coverage while any insured vehicle is being repaired, serviced or used by any person employed or engaged in a car business" and the exclusion "does not apply to any agent and employee of the named insured, but instead that any coverage provided to such an employee is excess only." State Farm further alleged Kidd was using the tow truck in a "car business" at the time of the incident, and therefore the policy did not provide

[2] Safeco contends the answer to the complaint was not admitted into evidence at trial. The record shows, however, the trial court took judicial notice of the answer, which was then properly before the trial court.

coverage to WAP or GMAC, and whether Kidd was covered depended on who Kidd's employer was at the time of the incident – if Kidd's employer was Dix, State Farm's policy would provide only excess coverage, but if Kidd was employed by any other person or entity, there would be no coverage. State Farm denied that its policy provided primary coverage to Kidd, WAP or GMAC.

In both the Jenness and declaratory relief actions it was undisputed Kidd was insured under Safeco's policy, although there was a legitimate dispute as to whether Kidd was Dix's agent, employee or partner. If Kidd was not Dix's employee, agent or partner, Kidd had no indemnity coverage under State Farm's policy. In filing the declaratory relief action, Bragg did not intend to eliminate coverage under the Safeco policy and it was never Safeco's position that its policy did not cover the loss; the only issue was whether the State Farm policy should pay first.

On May 7, 2001, after settlement was reached in the underlying action, the declaratory relief action was dismissed at Safeco's request, before the coverage issues were resolved.

The Underlying Settlement and Stipulated Judgment

Settlement discussions in the Jenness action between Jenness's counsel and Kidd's counsel began approximately one week before the mandatory settlement conference. Safeco was not advised of those discussions and did not participate in them.[3] Safeco never received a settlement demand with respect to Kidd and was intentionally excluded from all settlement discussions even though (1) a Safeco claims representative and an attorney from Bragg's office attended the settlement conference, (2) Bragg told Kidd

[3] Jenness's attorney's written settlement offer, which was addressed to the attorneys State Farm retained to represent Kidd and Dix, specifically stated the offer was "based on my understanding that Safeco is denying both a defense and coverage to William Kidd under the policy it issued" to WAP and that he needed to confirm that fact before concluding the settlement.

Safeco would still be involved after State Farm took over the defense, and (3) State Farm understood Safeco's tender did not mean Safeco was denying coverage.

The Jenness action was settled at the settlement conference, which was held before the Honorable William A. Mayhew. Dix was dismissed with a waiver of costs; WAP was dismissed without prejudice; and GMAC paid Jenness $1,000. State Farm paid Jenness $16,500 on Kidd's behalf. Kidd then agreed to a $750,000 stipulated judgment against him and in Jenness's favor, accompanied by a covenant not to execute against him personally and an assignment of any rights Kidd had against Safeco. During the settlement conference, Jenness's counsel requested the court determine the settlement was not the product of collusion or fraud and offered to produce evidence to that effect. The parties entered into a stipulation of facts upon which the settlement was based. Safeco's counsel, who was present at the hearing on behalf of WAP and GMAC, informed the court he was not privy to the settlement discussions and had not received a copy of the stipulated facts, some of which he believed to be untrue. Jenness's counsel represented there was a basis in the record for every fact. The court found there was no collusion or fraud in the settlement.

Following the settlement conference, Jenness submitted evidence to the court in support of his contention that the settlement was in good faith and free of collusion and fraud. Based on the evidence submitted, Judge Mayhew explained that Kidd might not have been struck on the head with a golf club, and if a jury so concluded, a substantial judgment in excess of one million dollars could be rendered against Kidd. Recognizing that contingency, the court signed an order which deemed the settlement to be in good faith and without collusion.

Safeco did not participate in or consent to the stipulated judgment. Neither did Safeco agree in writing or otherwise that Kidd had an obligation to pay anything to Jenness.

This Lawsuit

Jenness, as judgment holder, then filed this direct action under Insurance Code section 11580, subdivision (b)(2) to recover the $750,000 stipulated judgment from Safeco. The action was tried before the Honorable Roger M. Beauchesne. Three issues were presented to the court for resolution: (1) "Did Safeco 'deny a defense' and/or 'abandon' the defense of its insured, thereby exposing itself to liability for a stipulated judgment entered against its insured[?]"; (2) "Is this lawsuit barred by the Safeco policy 'no action' clause[?]"; and (3) "Was the stipulated judgment a product of collusion, thereby making it unenforceable[?]" The parties submitted the matter on a set of stipulated facts, supplemented by the testimony of attorneys Arata and Bragg and various trial exhibits.

After taking the matter under submission, the trial court issued a tentative decision in Safeco's favor, which became the statement of decision. With respect to the first issue regarding whether Safeco abandoned Kidd's defense, the court found as follows: "Safeco argues it never repudiated the policy and always acknowledged that its policy covered the loss. Indeed, Safeco never denied coverage for Mr. Kidd. [¶] Initially, Safeco appointed attorney Larry Bragg to defend Mr. Kidd until State Farm accepted the tender of defense and substituted its own counsel, Curtis and Arata. [¶] In the court's view, the evidence is overwhelming that Safeco did not abandon its obligation to defend Mr. Kidd. There was a legitimate dispute as to whether Safeco or State Farm was the primary carrier. [¶] [Jenness] has failed to prove by the requisite standard that abandonment occurred. On this basis alone, [Jenness]'s claim should be denied." Since the court concluded Safeco did not abandon Kidd, the court found on the second issue that the policy's no action clause barred Jenness's claim.

Since the court concluded there was no abandonment, it found it unnecessary to resolve the third issue regarding the collusiveness of the stipulated judgment. The court noted, however, the testimony was uncontradicted that Safeco's attorney and insurance

adjuster were not allowed to participate in the settlement conference, and "to allow a stipulated judgment to apply to [Safeco] under these circumstances is unsound public policy and fundamentally unfair, *unless* Safeco had abandoned its insured." The court found there was insufficient evidence to allow it to reject Judge Mayhew's conclusion that the settlement was in good faith and not collusive, "although a suspicion of collusiveness is entertained." Accordingly, the court stated it could not conclude the settlement and stipulated judgment was the product of collusion or fraud.

The court also made express findings on what it considered "collateral issues." The court rejected Jenness's argument that State Farm's defense of Kidd was less than it should have been because of its reservation of rights, finding there was insufficient evidence to establish the reservation of rights resulted in less than a competent defense as Arata testified "he defended Mr. Kidd 'fully and to the best of his ability' and that his defense 'was not affected in any way by State Farm's coverage position[,]'" and State Farm never withdrew from Kidd's defense or denied coverage. The court also stated it agreed with Safeco's position that it did not matter whether Safeco was correct in concluding its policy was excess to State Farm's, as what mattered was "that Safeco 'indisputably recognized that its policy was always in play, whether acting in a primary or excess capacity.'"

After judgment was entered in Safeco's favor, Jenness moved for a new trial and to set aside the judgment. These motions were denied.

DISCUSSION

Standard of Review

To the extent this case turns solely on the stipulated facts, it presents purely legal issues subject to de novo review. (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 437-438.) To the extent the stipulated facts give rise to conflicting inferences, we review the court's resolution of those conflicts for substantial evidence. (*Ibid.*; *McKinney v. Kull*

(1981) 118 Cal.App.3d 951, 955; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 634-635.)

Abandonment

Insurance Code section 11580, subdivision (b)(2) provides a statutory basis upon which an injured third party claimant may pursue a direct action against the tortfeasor's liability insurer as long as there is a judgment against the insured. (*Safeco Ins. Co. v. Superior Court* (1999) 71 Cal.App.4th 782, 786.) The requirement of a judgment against the insured is reflected in the standard "no action" provision of a liability insurance policy, which bars any action against the insurer until the insured's liability to the claimant has been determined by either a final judgment or a settlement approved by the insurer. (*Id.* at pp. 786-787.) Safeco's policy contains a "no action" provision, which states in pertinent part: "No one may bring a legal action against us … until … we agree in writing that the 'insured' has an obligation to pay or until the amount of that obligation has finally been determined by judgment after trial.…"

The "no action" provision gives the insurer the right to control the defense of the claim, i.e., to decide whether to settle or adjudicate the claim on its merits. (*Safeco Ins. Co. v. Superior Court, supra*, 71 Cal.App.4th at p. 787.) When the insurer agrees to defend its insured, a stipulated judgment between the insured and the injured claimant that is entered into without the insurer's consent is not enforceable against the insurer in an Insurance Code section 11580 action. (*Ibid.*; see also *Wright v. Fireman's Fund Ins. Companies* (1992) 11 Cal.App.4th 998, 1024 (*Wright*).) This is because a stipulated judgment, particularly one accompanied by a covenant not to execute against the insured, presents a potential for abuse: "With no personal exposure the insured has no incentive to contest liability or damages. To the contrary, the insured's best interests are served by agreeing to damages in any amount as long as the agreement requires the insured will not be personally responsible for those damages." (*Wright, supra*, at p. 1023.)

A stipulated judgment with a covenant not to execute may form the basis of an Insurance Code section 11580 action, however, where the insurer has wrongfully refused to defend, indemnify or participate in any way in the underlying lawsuit, provided the judgment was not the product of fraud or collusion. (*Sanchez v. Truck Ins. Exchange* (1994) 21 Cal.App.4th 1778, 1787; but see *Smith v. State Farm Mut. Auto. Ins. Co.* (1992) 5 Cal.App.4th 1104, 1114 [holding stipulated judgment with covenant not to execute was insufficient to meet judgment requirement of Civil Code section 2778, subdivision 5, necessary to assign bad faith claim against insurer because it shielded insured from liability].) As one appellate court explained, "… if the insurer wrongfully refuses to defend, leaving the insured to his own resources to provide a defense, then the insurer forfeits the right to control settlement and defense. In that event, the insured is free to settle the lawsuit on his own, and the insurer is bound by a stipulated judgment. [Citations.]" (*Safeco Ins. Co. v. Superior Court*, *supra*, 71 Cal.App.4th at p. 787.)

Here, Safeco always acknowledged that its policy covered the loss. Thus, unless Safeco wrongfully refused to defend Kidd, Safeco had the right to participate in the settlement with Jenness and its exclusion from the settlement discussions renders the stipulated judgment unenforceable. There is no dispute that when the Jenness action was tendered to Safeco, it agreed to defend Kidd. There is also no dispute that Safeco defended Kidd while it attempted to secure a defense and coverage from State Farm based on its belief that State Farm had the primary defense obligation. Safeco requested State Farm to associate with it in defending Kidd, but State Farm refused. Once State Farm agreed to defend Kidd, State Farm substituted in as Kidd's attorney of record and assumed Kidd's defense. While Safeco declined to split the cost of Kidd's defense, State Farm agreed to determine the issue of defense costs at a later time through special arbitration. Had State Farm withdrawn from Kidd's defense, Safeco would have continued to defend Kidd. Moreover, Safeco filed a declaratory relief action seeking a determination of the coverage dispute between itself and State Farm.

Based on these facts, the trial court reasonably could infer Safeco never refused to defend Kidd or repudiated its obligation to do so. (See *Sanchez v. Truck Ins. Exchange*, *supra*, 21 Cal.App.4th at p. 1784 ["'… where the insurer has repudiated its obligation to defend[,] a defendant in the absence of fraud may, without forfeiture of his right to indemnity, settle with the plaintiff upon the best terms possible, taking a covenant not to execute."] By its actions, Safeco ensured Kidd was never left without a defense, even though it believed its defense obligation was secondary to State Farm's.

Jenness argues the mere fact that State Farm took Safeco's place in defending Kidd means Safeco did not fulfill its defense obligation because Safeco knew (1) State Farm was defending Kidd under a reservation of rights and (2) Kidd faced a "distinct probability" he would have no coverage under State Farm's policy. As the trial court found, however, State Farm's defense of Kidd under a reservation of rights did not make Safeco's agreement to allow State Farm to assume Kidd's defense wrongful. This is because Kidd's defense was not affected in any way by State Farm's reservation, as evidenced by Arata's testimony that he defended Kidd to the best of his ability and Kidd's defense was not affected by State Farm's coverage position, and the facts that State Farm never denied coverage or withdrew from Kidd's defense and even made an indemnity payment on Kidd's behalf.

In asserting that Safeco knew State Farm's policy probably did not cover the claim, Jenness challenges the trial court's finding that there was a legitimate dispute as to whether Safeco or State Farm was the primary carrier. Jenness contends the finding is "legally incorrect and not supported by the evidence." We disagree.

An excess insurer generally has no duty to participate in the insured's defense or contribute to a settlement on its behalf until primary coverage is exhausted. (*Signal Companies, Inc. v. Harbor Ins. Co.* (1980) 27 Cal.3d 359, 366-368; *Phoenix Ins. Co. v. United States Fire Ins. Co.* (1987) 189 Cal.App.3d 1511, 1528.) Under Insurance Code section 11580.9, subdivision (d), any policy in which the vehicle is "described or rated as

an owned automobile" is "conclusively presumed" to be primary and any other insurance secondary. (*Mission Ins. Co. v. Hartford Ins. Co.* (1984) 155 Cal.App.3d 1199, 1205-1206.) When a case is resolved under the conclusive presumption of section 11580.9, subdivision (d), it is unnecessary to reach the effect of competing "other insurance" or excess clauses, as the conclusive presumption prevails. (*Travelers Indemnity Co. v. Maryland Casualty Co.* (1996) 41 Cal.App.4th 1538, 1549; *Grand Rent A Car v. 20th Century Ins. Co.* (1994) 25 Cal.App.4th 1242, 1254, fn. 9.)

In the declaratory relief action, Safeco asserted its policy was excess to State Farm's under Insurance Code section 11580.9, subdivision (d), as well as under the "other insurance" language in its policy that makes the policy excess to any other collectible insurance for covered vehicles not owned by WAP, because Dix's tow truck is specifically described as an owned vehicle in the State Farm policy and Kidd was an insured under the policy as he was using the tow truck with Dix's consent. While State Farm admitted in its answer to the complaint in that action that Kidd was using the tow truck with Dix's permission and the truck was specifically described in State Farm's policy, it pointed out there is no coverage under its policy when the truck is being used by any person employed or engaged in a "car business," which includes a business whose purpose is to transport motor vehicles, unless the person is an "agent, employee or partner" of Dix; in that situation, the policy specifies the coverage is excess. Based on this provision, State Farm asserted in its answer that its policy was excess, and in a letter to Safeco that the two companies would be co-insurers because both Safeco's and State Farm's policies stated they were excess.

Since the conclusive presumption of Insurance Code section 11580.9, subdivision (d) can trump other excess insurance provisions, however, Safeco's policy arguably may be excess to State Farm's, with State Farm being the primary insurer, *if* Kidd was Dix's

agent, employee or partner when the incident occurred.[4] While Jenness contends Safeco knew Kidd was none of these things because of Kidd's interrogatory response in which he identified his employer as WAP, Jenness stipulated at trial there was a "legitimate dispute" in both the personal injury action and the declaratory relief action "as to whether Mr. Kidd was an agent, employee or partner of Mr. Dix." Having so stipulated, Jenness cannot now contend otherwise. (See *McKee v. National Union Fire Ins. Co.* (1993) 15 Cal.App.4th 282, 290 fn. 4 [summarily rejecting claim of error about insurance coverage where case submitted on stipulated facts, one of which was that coverage within policy limits was not disputed].) As there was an arguable legal and factual basis for Safeco's position that its policy was excess to State Farm's, its belief to that effect was not unreasonable, as Jenness contends.

Jenness also asserts State Farm's defense of Kidd did not excuse Safeco from allowing State Farm to assume Kidd's defense, citing *Wint v. Fidelity & Casualty Company of New York* (1973) 9 Cal.3d 257 (*Wint*), which states: "Fidelity argues that even if it was under a duty to defend McGregor, its failure to do so was of no consequence, because Great American defended him, and he therefore was not prejudiced. Great American's policy, however, had a $10,000 limit, and a defense by an insurer whose policy has a limit far below the amount claimed cannot be equated to the defense of an insurer who stands to lose 10 times as much as the insurer who defends. This court has, in fact, held that where more than one insurer owes a duty to defend, a

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[4] Jenness contends because both policies state they are excess, State Farm and Safeco would be co-insurers, citing *Century Surety Co. v. United Pacific Ins. Co.* (2003) 109 Cal.App.4th 1246, in which the court ignored an insurer's excess clause and compelled equitable proration of defense costs among four insurers who all had "other insurance" clauses in their policies. That case, however, did not involve the application of the conclusive presumption of Insurance Code section 11580.9, subdivision (d) and therefore does not compel a conclusion that State Farm and Safeco would be co-insurers.

defense by one constitutes no excuse of the failure of any other insurer to perform. [Citation.]" (*Id.* at p. 263.)

Wint does not compel a conclusion that Safeco's decision to allow State Farm to assume Kidd's defense was wrongful. In *Wint*, there was a potential for harm because the defending insurer had limited exposure and thus the insured might get less of a defense than the insurer who refused to defend owed. In contrast here, the discrepancy between the two policy limits – one million for Safeco versus $300,000 for State Farm, which is a little over three to one – was not as significant as the ten to one discrepancy in *Wint*. More importantly, the evidence in this case establishes, contrary to the court's assumption in *Wint*, that Kidd did not get less of a defense from State Farm, as the parties stipulated the defense was not affected in any way by State Farm's reservation of rights and Arata testified he defended Kidd totally and to the best of his ability.

In essence, Jenness contends Safeco had an obligation to continue to participate in Kidd's defense after State Farm acknowledged its duty to defend and assumed his defense either by acting as co-counsel or agreeing to pay part of his defense costs, and its failure to do so constitutes abandonment. We disagree. Once State Farm recognized its defense obligation and assumed Kidd's defense, the issue between State Farm and Safeco became the payment of defense costs – whether those costs would be shared between the two companies as coinsurers or whether State Farm would bear the defense costs as the sole primary insurer, an issue that was to be determined in the declaratory relief action. Despite this dispute, Safeco remained involved in the Jenness action, as it continued to represent two other defendants, namely WAP and GMAC, and continued to acknowledge both its coverage obligation and its duty to defend Kidd if State Farm ever withdrew from representing him.

As Safeco points out, if insurers cannot reach an agreement to share defense costs, the paying insurer may have a right of equitable contribution from the non-paying insurer. (See, e.g., *Maryland Casualty Co. v. Nationwide Mutual Ins. Co.* (2000) 81

Cal.App.4th 1082.) The insured, however, protected by the defense afforded by one of his insurers, has no standing to complain about how those costs are shared and has no breach of contract claim against the non-paying insurer for failure to defend. (See, e.g., *Tradewinds Escrow, Inc. v. Truck Ins. Exchange* (2002) 97 Cal.App.4th 704, 712 [defense costs not recoverable by insured in action for either breach of contract or bad faith refusal to defend where insurer had duty to defend but other insurer assumed the defense]; *Horace Mann Ins. Co. v. Barbara B.* (1998) 61 Cal.App.4th 158, 164 ["… the failure of one insurer to defend is of no consequence to an insured whose representation is provided by another insurer … "; in such situations, one insurer's failure to defend did not harm insured and involved only other insurer's right to contribution from non-defending insurer].)

The question here is not whether State Farm had an obligation to protect Safeco, as Jenness contends. The question is whether Kidd had an obligation to include Safeco in the settlement discussions and obtain its approval before entering into a settlement. Kidd had such an obligation if Safeco continued to participate in the Jenness action and did not repudiate the contract or its defense obligation. Although State Farm assumed Kidd's defense, Safeco never repudiated the contract, as it defended Kidd, agreed to cover the claim, and would have continued to defend Kidd if State Farm had withdrawn from doing so. The dispute between the two carriers regarding defense costs did not constitute abandonment. The critical question for determining whether a stipulated judgment may be enforced is whether the insurers accepted the insured's defense; because the trial court found Safeco agreed to defend Kidd, and never abandoned its obligation to do so, it correctly concluded the stipulated judgment was not binding.

DISPOSITION

The judgment is affirmed. Safeco is awarded its costs on appeal.

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Gomes, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Hill, J.